

CONSUMER PROTECTION UNDER ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE

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Consumer protection from defective goods or unfair contracts has become a subject of increased attention with the establishment of legal assistance for indigent claimants who have been the victims of unscrupulous merchants. Lawyers are searching the Uniform Commercial Code for legal remedies for consumer wrongs. This article attempts to dissect the portion of the Uniform Commercial Code dealing with sales transactions, article 2, and chart some of the established and potential remedies available to the customer. There are two classes of cases in which consumer protection is most often needed. One involves transactions in which the buyer does not receive the quality of merchandise for which he had bargained. This class gives rise to claims dealing with warranties that may have attached during the sale. The second involves transactions in which the buyer receives merchandise in conformity to his expectations but other aspects of the agreement seem unfair. The latter class may give rise to arguments based on unconscionability or lack of good faith.

I. CREATION OF WARRANTIES

Where the goods are defective, the buyer's legal remedy will most often be an action for breach of warranty. Under the Code, there are two types of warranties relating to the quality of the goods: express¹ and implied.² Each of these warranties contains subparts to give protection for different aspects of the sales transaction. The express warranty results from some affirmative act by the seller in attempting to promote his product. This action by the seller may take the form of a promise or an affirmation with respect to the

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¹ UNIFORM COMMERCIAL CODE § 2-313 [hereinafter cited as U.C.C.].

² *Id.* §§ 2-314 (implied warranty of merchantability), 2-315 (implied warranty of fitness for particular purpose).

quality of his products. Most often this warranty will be created by an oral or written guarantee, but the word "guarantee" need not be present; in fact, many oral statements by the seller will be adequate to create this type of express warranty.³ A less obvious express warranty is that the kind of goods sold will actually be delivered to the buyer. For example, if a seller promises to sell a heavy duty motor, he warrants both that a motor will be delivered to the buyer and that such motor will be a heavy duty one. It would seem that every sale agreement contains an express warranty, at least to the extent the description of the product carries a promise that the goods will be delivered and will conform to that description.⁴ Express warranties are not limited to verbal promises of the seller but include use of a model or sample by a seller to indicate his goods to the buyer.⁵

Not all acts of the seller give rise to express warranties. There must also be shown some degree of reliance on the part of the buyer to transform an act of the seller into a warranty upon which an action for damages may be based. To create an express warranty under the Code the promise, affirmation, description, or sample must be part of the "basis of the bargain."⁶ The basis of the bargain test is a change from the warranty test of the Uniform Sales Act which required that the affirmation or promise be "relied upon" by the buyer before a warranty would arise.⁷ The Code, however, recognizes the reliance doctrine as being peculiar to estoppel, based on a subjective theory of contract and difficult of proof. It therefore creates a presumption that reliance has occurred by putting the seller to his proof that his statements could not have become the basis of the bargain. A broader and more objective standard is the result.

The second type of warranty which the Code recognizes is the

³ *Id.* § 2-313(2). Puffing, as defined by this section, is excluded from the express warranty, since it cannot fairly be viewed as entering into the bargain. The presumption is created that any statements made by the seller become part of the basis of the bargain, and good reason to the contrary must be shown to exclude such statements from the express warranty. See § 2-313, Comment 3. See also *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966).

⁴ See *Smith v. Zimbalist*, 2 Cal. App. 2d 324, 38 P.2d 170 (1934) for a pre-Code analysis of conformity to description.

⁵ U.C.C. § 2-313(1)(c).

⁶ *Id.* § 2-313.

⁷ UNIFORM SALES ACT § 12, [hereinafter cited as SALES ACT]. Reliance was unnecessary in warranties of description and sample because both were implied warranties; SALES ACT §§ 14, 16.

implied warranty. One of these is the implied warranty of merchantability.⁸ This warranty arises whenever a merchant⁹ makes a sale of an item from his regular inventory, including food or drink wherever consumed. The other implied warranty recognized by the Code is the warranty of fitness for a particular purpose.¹⁰ This warranty is implied where the buyer relies on the skill and judgment of the seller to furnish goods suitable for the buyer's particular purpose and the seller knows of this reliance.

Although the warranty terminology is similar to that used under the Sales Act,¹¹ a careful look at the sales warranties found in the Code will show that they are not precisely the same. The Code has done three important things to warranty law. First it enlarged warranty protection over that provided by the Sales Act. Thus warranties under the Code will arise more often and be broader in scope than the comparable warranties under the Sales Act. Abolition of the inducement-reliance requirement of express warranty will expand consumer recourse against the unscrupulous merchant. Inclusion of food and drink in the warranty of merchantability alters the rule in some jurisdictions.¹² The expansion of products liability through the warranty of merchantability is encouraged in section 2-314(3). Another change is the Code's clarification of the implied warranty of merchantability, the warranty lawyers rely upon most heavily in personal injury cases. In the Sales Act merchantability was undefined, and various interpretations of its content arose.¹³ The Code sets forth six distinct requirements to meet the warranty,¹⁴ while leaving room for judicial expansion. Third, the Code makes warranties cumulative.¹⁵ The latter improvement eliminates the need to elect between warranties and permits claims to be made under any combination

⁸ U.C.C. § 2-314.

⁹ *Id.* § 2-104(1).

¹⁰ *Id.* § 2-315.

¹¹ SALES ACT §§ 12-16.

¹² This provision resolves a conflict among jurisdictions begun in the classic cases of *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N.E. 407 (1918) and *Valeri v. Pullman Co.*, 218 F. 519 (S.D.N.Y. 1914). Ohio has long allowed recovery for injury by defective food or drink. See *Yochem v. Gloria, Inc.*, 134 Ohio St. 427, 17 N.E.2d 731 (1938); *Tipple v. High Street Hotel Co.*, 70 Ohio App. 397, 41 N.E.2d 897 (1941).

¹³ See Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 125-139 (1943).

¹⁴ U.C.C. § 2-314(2).

¹⁵ *Id.* § 2-317.

of the warranties, unless a particular combination would be unreasonable or inconsistent. Rules are provided for ascertaining the intention of the parties in the event cumulation is not possible.¹⁶

II. PAROL EVIDENCE RULE

There may be a practical limit on a remedy based on warranty due to the parol evidence rule, which traditionally insured that when a contract had been reduced to writing the written terms would not be later contradicted by extrinsic or parol evidence. The parol evidence rule was firmly entrenched in our common law and is retained under the Code: "Terms . . . which are . . . set forth in a writing intended by the parties as a final expression of their agreement . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. . . ."¹⁷

The force of the rule was demonstrated in a recent Arkansas case, *Green Chevrolet Co. v. Kemp*.¹⁸ In this case an automobile salesman had assured the buyer during oral negotiations that preceded the sale that the car was absolutely guaranteed for one year, and it was shown that such guarantee formed the basis of the bargain. But the written sales agreement said nothing about warranties. In fact, it stated that the consumer had fully examined the car, tested it and found it to be in first-class condition. The Arkansas Supreme Court said that evidence of the oral one year guarantee was not admissible. The written contract stating that the car was in first-class condition bound the parties and could not be contradicted by oral evidence. Fortunately there are some real limitations on the impact of the parol evidence rule, but lawyers often overlook them because they either do not understand the Code provisions, or they fail to analyze the Code or facts with imaginative minds.

A. *Written Exclusions of Implied Warranties*

Under the Code, a written contractual term purporting to prevent any warranties from arising during a sale does not necessarily foreclose their existence. For example, section 2-316 requires that any written disclaimer of the implied warranty of merchantability must mention the word "merchantability." Furthermore, the

¹⁶ *Id.* These rules prefer specificity over inconsistent general language and express over implied warranties. Note, also, that the seller is estopped to assert the inconsistency where he has led the buyer to believe all warranties can be performed. U.C.C. 2-317, Comment 2.

¹⁷ *Id.* § 2-202.

¹⁸ 241 Ark. 62, 406 S.W.2d 142 (1966).

disclaiming language must be conspicuous; the Sales Act approach permitting all warranties to be excluded by small print on the back of the written contract was abandoned by the Code. The new Code requirements are illustrated in a case recently decided by the Massachusetts Supreme Court. In *Hunt v. Perkins Machinery Co.*,¹⁹ the disclaimers were on the back of the sales order and there was no signal on the front of the sales order, where the parties had signed, indicating further sales conditions were to be found on the back. The buyer therefore would become aware of the disclaimers found on the back only after he had already signed the contract on the front. The court held the disclaimers were ineffective because they were not conspicuous, and the buyer was allowed to sue on the implied warranties. The Code follows a similar approach in dealing with the implied warranty of fitness for purpose. To exclude this warranty, the exclusion must be in writing and must be conspicuous.²⁰

B. *Exclusion of Express Warranties*

Although implied warranties can be excluded by a written instrument if certain conditions are met, an express warranty found in the written agreement cannot be excluded. The express warranty arises because the seller has done something affirmative to push the sale. By reducing to writing a promise, affirmation, guarantee, or description, the seller has made an express warranty which he cannot escape by some language in the sales agreement seeking to negate or disclaim warranties. For example, if the sales agreement guarantees tires to run for 50,000 miles, two express warranties have arisen. One is that the goods delivered to the buyer will, in fact, be tires; the other is that the tires will run for 50,000 miles. Having made these two express warranties, the seller cannot in a later paragraph of the sales agreement say that there are no express warranties involved in the sale.²¹

C. *Requirement of Finality*

Another important restriction on the scope of the Code's parol evidence rule is that it applies only where the writing is "intended by the parties as the final expression of their agreement."²² Every

¹⁹ 352 Mass. 535, 226 N.E.2d 228 (1967).

²⁰ U.C.C. § 2-316(2).

²¹ *Id.* § 2-316(1).

²² *Id.* § 2-202.

writing connected with the sales transaction does not necessarily present parol evidence problems. Writings containing disclaimers of warranties, which are delivered to the buyer after the transaction is closed, can hardly be classified as a writing intended by both parties as the final expression of their agreement. It is nothing more than a writing prepared by the seller for his own self-serving purposes and does not give the seller the right to claim the protection of the parol evidence rule. In a recent California case the court stated that:

Attempts to escape liability for warranties . . . by disclaimers made "*upon or after* delivery of the goods, by means of language on an invoice, receipt or similar notice," are ineffectual "unless the buyer assents or he is charged with knowledge of non warranty as to the transactions."²³

The writing must be shown to be one which both parties have agreed shall be their expression of the contract before the parol evidence rule will be applicable.

D. *Consistent Additional Terms*

When the parties have agreed to express their sales contract in a writing, section 2-202 makes it clear that the writing is binding only as to statements actually contained in the writing. If there are aspects of the agreement not contained in the writing, these additional matters may be established by extrinsic evidence. The only restriction on the introduction of additional terms is that these terms must be consistent with the writing. For example, the parties may have signed a sales agreement which contained the price, the delivery date and the credit terms. However, if the written agreement is silent as to warranties the writing will be binding only on the matters of the price, delivery and credit terms, and extrinsic evidence may be introduced to show warranties which are not covered by the writing and do not contradict the terms of the writing.

E. *Explanation of Language*

The parol evidence rule does not prevent a party from using extrinsic evidence to explain what the language in the writing was intended to mean. This is true even though the language on its face may appear to be unambiguous. Under the Code, the plain meaning of the language found in a sales agreement may not be con-

²³ Klein v. Asgrow Seed Co., 246 Cal. App. 2d 87, 102, 54 Cal. Rptr. 609, 616 (1966).

trolling.²⁴ The Code is more interested in what meaning the parties actually intended to attach to the particular language.²⁵ Evidence of their intended meaning may be found in their past dealings and by the usages of the trade. Thus, the Code permits extrinsic evidence to be introduced to show that the word "dozen" when used by bakers in a sales contract really means thirteen. Likewise, a thousand sacks of sugar in the sugar industry may not mean one thousand at all. Instead, it may mean a thousand sacks plus or minus ten per cent. Although no cases have been found where this type of evidence was introduced to clarify a warranty, the legal principle would certainly apply to warranty language. For example, the words "three months warranty" in a particular industry, or between a particular seller and a particular buyer, may really mean four months of free service. If it can be demonstrated that sellers in that trade, as a matter of course, normally give service beyond the precise warranty period, the customer may get the benefit of the extended warranty protection.

F. *Future Agreements*

Another important limitation on the parol evidence rule is that the rule only prevents introduction of extrinsic evidence of understandings that the parties agreed upon prior to or contemporaneously with the execution of the writing.²⁶ Thus evidence of a one year guarantee given after the parties signed a contract containing only a six month warranty would not be excluded by the rule. In the context of consumer sales transactions one finds that sellers will often make statements about the quality of their goods after purchaser has signed a written contract purporting to exclude warranties. At first it might appear that subsequent statements would always fail to meet the "basis of the bargain" requirement for express warranties.²⁷ But subsequent agreements become modifications of the original contract and need no new consideration to be binding on the parties.²⁸ The only exception to this rule is where the parties agreed in the written contract that no oral modification of the original agreement would be permitted.²⁹ Even with such a provision subsequent oral modification might be effective as a waiver,³⁰

²⁴ U.C.C. § 2-202 and Comment 3.

²⁵ *Id.*

²⁶ *Id.* § 2-202.

²⁷ See note 7 *supra* and accompanying text.

²⁸ U.C.C. § 2-209(1).

²⁹ *Id.* § 2-209(2).

³⁰ *Id.* § 2-209(5).

or the buyer may not have separately signed the term barring future oral modification in the original contract, as required by the Code to make such a prohibition effective.³¹

G. *Fraud and Mistake*

Another method of circumventing the parol evidence restriction is to demonstrate that the agreement has been tainted with fraud. Historically, attempts to prove fraud were not barred by the parol evidence rule because the policy favoring a just result against the intentional or unintentional advantage that the seller had acquired over the buyer overrode the policy to insure certainty in written agreements. The common law courts distinguished between two kinds of fraud—fraud in the execution and fraud in the inducement.³²

Fraud in the execution arose where the party was justifiably unaware of what he had signed—for example, the situation where a blind person is told to sign a receipt. It later turns out that the paper is a sales agreement. The common law courts would not enforce this sales agreement because it had been procured by fraud. The blind man did not intend to sign a sales agreement, and thus a basic requirement was not met. The signing had come about because of the fraud practiced on the blind man.

Fraud in the execution was also available where an illiterate person signed a contract that he could not understand and therefore he could easily be misled. This defense was not extended to people who were not completely blind or completely illiterate. The usual theory was that people capable of reading ought to read what they are signing; and if they did not, they cannot argue that they were misled in the same fashion as a blind or illiterate person might have been. Justice Taft of the Ohio Supreme Court put it this way:

A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth by merely looking when he signed. If this were permitted, contracts would not be worth the paper on which they are written. If a person can read and is not prevented from reading what he signs, he alone is responsible for his omission to read what he signs.³³ (Citation omitted.)

³¹ *Id.* § 2-209(2) and Comment 3.

³² See generally Annot., 56 A.L.R. 13 (1928).

³³ *Dice v. Akron, C. & Y. R.R.*, 155 Ohio St. 185, 191, 98 N.E.2d 801, 804 (1951), *rev'd on other grounds*, 342 U.S. 359 (1952).

Hence, fraud in the execution was a way of getting around the parol evidence rule if the rather strict requirements could be shown. If this kind of fraud was shown, a court would declare the contract void.

Common law courts recognize a second kind of fraud—fraud in the inducement. Fraud in the inducement arose when a buyer knew or could easily find out that he was signing a sales agreement. Nonetheless, he signed the contract without ordinary investigation because of a false representation from the seller about the subject matter or content of the contract. If the buyer could establish this misrepresentation, his contract, though not void as was true in the fraud in the execution situation, was voidable and could be rescinded at the buyer's option. The parol evidence rule did not bar evidence of this kind of fraud.

An interesting example of rescission for fraud is a District of Columbia case, *Saylor v. Handley Motor Co.*³⁴ The buyer told an automobile dealer that he could only afford to pay eighty dollars per month for the purchase of his car. The seller assured him that the car he selected could be purchased for that sum. The buyer then signed a purchase agreement in which the monthly payments were left blank. Subsequently, the seller filled in these blank spaces, not for the agreed eighty dollars per month, but for the sum of eighty-eight dollars per month. The court held that this amounted to fraud on the buyer and permitted him to rescind the sales contract. The court pointed out in dictum that the rule was equally applicable to a sales agreement which was completed when the buyer signed it, but which contained terms that were contrary to the prior understanding of the parties. The court cited with approval the following language:

The rule is that where one party to an oral agreement entrusts the other with the obligation of reducing it to writing, he has a right to rely upon the representation that it will be drawn accurately and in accordance with the oral understanding between them. The presentation of the paper for signature is in itself a representation that the terms of such oral agreement *have been or will be embodied in the writing.*³⁵ (Emphasis added.)

The court stated that fraud can occur even though the party is negligent in not reading the agreement before signing it where there is a false representation by the seller as to what is contained in the writing. Thus, under common law rules, oral warranties, which

³⁴ 169 A.2d 683 (D.C. Mun. Ct. App. 1961).

³⁵ *Id.* at 685.

were made by the seller and understood to be embodied in the written contract by the buyer, could provide a basis to rescind the agreement if they were not in fact so incorporated. However, the common law rule did not permit every written agreement to be ignored where there were prior oral agreements to the contrary. The whole purpose of the parol evidence rule was to prevent that from happening. To avoid the parol evidence rule, one had to show that he was induced to sign this writing because of the seller's false representation that something was contained in the agreement which actually was not there. The burden of proving the fraud is often a heavy one, requiring clear and convincing evidence. Moreover, the fact that the seller has a writing containing the buyer's signature is evidence suggesting that no fraud has been practiced.

Under the Code these common law distinctions and remedies remain. The actual words of the Code state that the parol evidence rules applies only to writings which are "intended by the parties as a final expression of their agreement. . . ."³⁶ If one party has been misled as to what the writing contains, it would seem the writing was not intended by *him* as any expression of his agreement, final or otherwise. Furthermore, the principles of "fraud, misrepresentation, duress, coercion, mistake, . . . or other validating or invalidating cause," found in section 1-103, supplement the sales provisions of the Code unless specifically displaced by it. The Code recognizes that fraud is available as a defense to a sales contract.³⁷ In fact, where fraud has been practiced in a sales situation, the buyer may exercise his common law right to rescind the contract.³⁸ In addition, section 2-721 also declares that all of the traditional remedies for damages provided by the Code are available to the buyer as well. Thus, a choice of remedies is provided to escape an agreement tainted by fraud.³⁹

III. UNCONSCIONABILITY AND GOOD FAITH

The Code permits a court to refuse to enforce a contract, or any part of it, which is unconscionable.⁴⁰ It is profitable to consider the prohibition on unconscionable agreements together with the duty to bargain in good faith imposed by the Code on all persons who enter

³⁶ U.C.C. § 2-202.

³⁷ *Id.* § 2-721.

³⁸ *Id.*

³⁹ See *Associated Hardware Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114 (3d Cir. 1966).

⁴⁰ U.C.C. § 2-302(1).

into commercial transactions.⁴¹ The Code establishes two tests for good faith. Nonmerchants must act honestly in a subjective sense.⁴² However, section 2-103(1)(b) holds a merchant to a higher and more objective standard of good faith. A merchant has a duty to observe the reasonable commercial standards of fair dealing in his trade.⁴³ Fair dealing may be a higher standard of conduct than unconscionability. Certainly few trade associations would admit that their conception of fair dealing is measured only by standards of outright unconscionability. Most trades would probably assert that a great deal more is expected from their members in order to measure up to acceptable standards of fair dealing. Assuming a higher standard for the particular trade, when a merchant overreaches the standard of "fair dealing" in his trade, but has not reached the point of outright unconscionability, a buyer could argue that the transaction should be invalidated. However, no court has yet accepted the collective opinion of a trade as a basis for establishing the reasonable commercial standard of fair dealing to which an individual member of that trade should be held accountable.

IV. LIMITATION OF REMEDY

Before the Code, a seller could try to avoid liability to a buyer by limiting the remedy available to the buyer in the original sales agreement.⁴⁴ The seller may concede that he has given an express warranty, or an implied warranty, or both of them. In fact, the seller may also admit that the warranties which were given have been breached. However, the seller then points to a clause in the sales agreement which states that the buyer's remedy for the breach of warranty is limited. For example, a liquidated damage clause in the sales agreement may limit recovery for a breach to a fixed sum of money insufficient to replace the buyer's actual losses. A sales agree-

⁴¹ *Id.* § 1-203.

⁴² *Id.* § 1-201(19) and Comment 19. This section defines good faith as honesty in fact. *See, e.g., Meadowbrook Nat'l Bank v. Markos*, 3 U.C.C. RPTG. SERV. 854, 856 (N.Y. Sup. Ct. 1966).

⁴³ U.C.C. § 2-103(1)(b).

⁴⁴ *See, e.g., McDonald Credit Service, Inc. v. Church*, 49 Wash. 2d 400, 301 P.2 1082 (1956); *W. F. Dollen & Sons v. Carl R. Miller Tractor Co.*, 214 Iowa 774, 241 N.W. 307 (1932). *Cf. SALES ACT* § 71. *See generally* Fritz, "Underliquidated" Damages as Limitation of Liability, 33 TEXAS L. REV. 196, 196-98 (1954); Note, *Contractual Disclaimers of Warranty*, 23 MINN. L. REV. 784, 784-85 (1939) (containing a brief history of the use of disclaimers); Note, *Limitations On Freedom To Modify Contract Remedies*, 72 YALE L.J. 723, 724-26 (disclaimers), 746-55 (liquidated damages) (1963).

ment might provide that the seller shall not be liable at all for money damages, but provide for some kind of substitute remedy. For example, a substitute remedy might limit a buyer to a replacement of defective parts.

The Code's basic approach to contractual remedies is the authorize only fair and conscionable limitations of remedy. It contains a series of rules which declare certain specific kinds of limitations on remedies to be unfair and invalid.⁴⁵ Beyond these specific rules, the general doctrine of unconscionability may also invalidate grossly unfair remedy limitations.

One of these specific rules controls liquidated damage clauses.⁴⁶ Liquidated damage clauses can work two ways. First, the *buyer* may be required to pay a certain fixed sum of money if he does not perform the contract. The Code's approach to this problem is to codify the pre-Code law. When such a liquidated damage clause is unreasonably large compared to the actual damages suffered or anticipated the clause may be void as a penalty.⁴⁷ The second type of liquidated damage clause limits the seller's liability to less than he otherwise would have been responsible for under general rules of damages. For example, a seller who sells a washing machine to a buyer might provide that damages for breach of warranty shall not exceed five dollars even though the loss to a buyer is a great deal more than that. Since the limitation is entirely unreasonable in light of the anticipated or actual harm, the Code will invalidate this clause. If the liquidated damage clause is invalidated, the injured party may then proceed under normal Code rules for proving damages.

The Code has another section of specific rules dealing with substitute remedies.⁴⁸ One situation in which this section is useful is that where the sales agreement states that the buyer's only remedy for receiving defective goods is to have them replaced with satisfactory goods. The Code's first rule on this kind of clause is a technical one. If a particular substitute remedy is to be the exclusive remedy in lieu of the usual Code remedies, section 2-719 requires that the exclusive feature of the remedy be expressly stated in the sales agreement. If it is not expressly stated, the Code declares that the substitute remedy is only optional and in no way prevents an aggrieved party from pursuing all the other remedies normally given

⁴⁵ U.C.C. §§ 2-718, 2-719.

⁴⁶ *Id.* § 2-718.

⁴⁷ *Id.* § 2-718(1) and Comment 1.

⁴⁸ *Id.* § 2-719.

to him by the Code.⁴⁹ Even where the sales agreement does expressly state that the limited remedy is an exclusive one, such term may not be binding. If the essential purpose of the remedy should fail, the aggrieved party can ignore it and turn to his usual Code remedies instead.⁵⁰ For example, if a seller has sold a washing machine to a buyer and the sales agreement provides that the buyer's exclusive remedy shall be limited to a replacement of the defective parts, this limitation might appear to be a perfectly proper one. However, if the washing machine is poorly engineered and as a result every time it is used the motor burns out, this would seem to be a case where the exclusive or limited remedy has failed of its essential purpose, namely, the purpose of giving to the buyer a workable washing machine. Section 2-719 would then declare that this limitation on the remedy may be ignored and permit the buyer to turn to the other remedies normally provided for him under the Code, such as damages or revocation of acceptance.

Elements of fraud and misrepresentation may also remove the mandatory nature of an express limited remedy clause. In a recent California decision, the court dealt with seeds purchased by a tomato grower.⁵¹ At the time of the sale, the seller knew that the tomato seeds were defective and would not produce high quality crops as warranted. His attempt to limit the remedy to return of purchase price was held to be a fraud on the buyer, which the buyer could ignore. The decision suggested that the limitation on the remedy might be ignored and the full damages recovered.⁵² At least this would be so if the seller knew at the time of the sale that his goods were defective. According to the California court, if a seller knows when he sells his goods that they are defective, it is a fraud to limit the remedy. If this kind of rule is applicable in commercial situations, it seems that it ought to be equally applicable in consumer situations where a buyer is placed in an inequitable situation by limitations on remedies and the seller knew at the time of the sale that his goods would not work properly.

There is still another rule the Code imposes on an attempt to limit the remedies available for breach of warranty. The Code makes any attempt to limit damages for personal injury where consumer goods are involved *prima facie* unconscionable.⁵³ An example of how

⁴⁹ *Id.* § 2-719(1)(b).

⁵⁰ *Id.* § 2-719(2).

⁵¹ *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966).

⁵² *Id.* at 98, 54 Cal. Rptr. at 617-19 (dictum).

⁵³ U.C.C. § 2-719(3).

this might work would be where a housewife buys an iron and is severely burned because of a defect in the iron. The original sales agreement for the iron might have stated that no damages would be allowed by reasons of defects in the iron but instead limited the buyer's remedy to a refund of the purchase price, or to a replacement of the defective iron with a new one. However, because the iron is consumer goods and personal injuries are involved, the Code states that attempts by the seller to limit his buyer's remedy are prima facie unconscionable. Unless the seller can overcome this prima facie rule against him, the housewife may recover the full damages for her burns, regardless of the language of the sales agreement stating otherwise. This prima facie unconscionability rule where consumer goods are involved is of great interest to personal injury lawyers because automobiles are classified as consumer goods.

V. EXCLUSION OF WARRANTIES

The seller may try to deny the existence of all warranties by a contract. If his goods are defective, the seller's limitation may be struck down if it comes within the spirit of the unconscionability doctrine which pervades all aspects of a sales transaction. It seems rather curious that Article 2 contains so many specific rules dealing with seller's attempts to *limit* the remedy for breach of warranty but provides only the general unconscionability doctrine to deal with a seller's attempt to completely exclude all warranties. Section 2-316 (1), however, prefers warranty-creating language over negating or limiting language when they cannot reasonably be construed as consistent.

VI. EXCESSIVE PRICE

Another area in which unconscionability doctrine may prove helpful is where the price is excessive even though the goods are in no way defective. Several decisions strongly hint that excessive price alone may make a contract unconscionable. However, these decisions give little specific guidance to the problem of determining when, if ever, unconscionability can occur solely because the price is excessive.

The case most often discussed is *Williams v. Walker-Thomas Furniture Co.*⁵⁴ From 1957 to 1962 the appellants purchased a number of household items from the Walker-Thomas Furniture Company. At the time of each purchase the appellants signed a form contract which purported to lease the additional items to them for

⁵⁴ 350 F.2d 445 (D.C. Cir. 1965).

a monthly rental payment. The title to each item was to remain in the furniture company until all the monthly payments were made. This add-on provision had the effect of maintaining title in Walker-Thomas until all the outstanding lease payments were made on each purchase. Among the items was a stereo with a purchase price of 678 dollars, which was sold to appellants while they were receiving public assistance payments. Walker-Thomas knew appellants were receiving public assistance. On default by appellants Walker-Thomas sought to repossess the stereo, along with almost all of the other household furniture purchased by appellants during the 1957 to 1962 period.⁵⁵

In his defense to repossession, the buyer argued "unconscionability." The trial court criticised the sharp practice and irresponsible business policy of selling high-priced stereo sets to welfare recipients, but felt compelled to hold for the seller on the grounds that the doctrine of unconscionability was not part of the common law.⁵⁶ The court of appeals reversed, holding that unconscionability was a defense available at common law. The court remanded the case, directing the trial court to determine whether unconscionability actually existed under the facts of this case.⁵⁷ The disposition on remand was apparently not reported.

The precedent that *Walker-Thomas* established was that an action based on a theory of unconscionability could be maintained without statute. Since the subsequent adoption of the Code in the District of Columbia there is little need for this authority. The case did not define the elements needed for a successful action based on unconscionability or what remedy would be available. The problem of fashioning a remedy may be a difficult one. Would this court permit the buyer to keep the stereo set without paying for it or give the buyer an absolute right to return the set and recover any payments? The implications of the decision on consumer sales raises serious policy questions. Did this court mean to suggest that sellers are supposed to police their poor-risk customers and determine what goods they may or may not buy? Did the court mean to imply that welfare recipients may not purchase stereo sets, or other luxury or semi-luxury items?⁵⁸ If so, would they be equally barred from buying

⁵⁵ *Id.* at 445-447.

⁵⁶ *Id.* at 448-449.

⁵⁷ *Id.* at 450.

⁵⁸ Cf. Leff, *Unconscionability and the Code—the Emperor's New Clothes*, 115 U. PA. L. REV. 485, 558 (1967) arguing that the low income consumer should be discouraged from purchasing luxury goods.

a small table radio, which, perhaps, is not a necessity of life but gives great pleasure to it? What does this kind of a decision do to the availability of credit to these buyers? If the implications of this decision are carried to their fullest, just what legitimate seller will deal with impoverished buyers, even at a fair price, where the possibility exists that if he does so, a court might second guess him on his decision to deal with this buyer? The *Walker-Thomas* case provides little insight into the specific characteristics of unconscionability and leaves many vague suggestions which, if carried to their ultimate, could prove disturbing. The dissenting opinion pointed out that this buyer apparently knew her obligations when she entered into the sale; and, that if overseeing of welfare clients' purchases is required, then it should come through a legislative program and not by judicial fiat.⁵⁹

A more useful case is *American Home Improvement, Inc. v. MacIver*.⁶⁰ That case involved a sale of siding, fourteen windows and one door. The actual cost of installation was about 950 dollars; however, added to this cost was a sales commission of 800 dollars and carrying charges for a sixty-month period of another 800 dollars. The buyer signed a contract to pay about 2,500 dollars for only 950 dollars worth of goods. The New Hampshire court found this to be unconscionable and refused to enforce the contract.⁶¹ The persuasive force of this case may suffer due to the rather unusual position of the parties at the time the action was brought. The buyer had cancelled the contract after the seller had completed a negligible amount of work. Accordingly, a complete cancellation of the contract could be ordered by a court without causing any undue hardship to the seller or any unjust enrichment to the buyer. A much more difficult situation arises when the goods have been delivered to the buyer and used by him. Since the *American Home Improvement* case did not deal with this kind of fact situation, it could easily be distinguished in the more typical situation where the contract has been executed. A further limitation on the applicability of *American Home Improvement* is that the contract at issue was in violation of the New Hampshire truth-in-lending statute.⁶² Thus, a ground for decision independent of the unconscionability issue existed, and the court held

⁵⁹ 350 F.2d at 450 (dissenting opinion).

⁶⁰ 105 N.H. 435, 201 A.2d 886 (1964).

⁶¹ *Id.* at 438-39, 201 A.2d at 888-89.

⁶² *Id.* at 437-38, 201 A.2d at 887.

the contract unenforceable both because it violated the New Hampshire disclosure statute and because it was unconscionable.

The case which most strongly supports the proposition that excessive price alone may make a contract unconscionable in *Frostifresh Corp. v. Reynoso*.⁶³ The facts present the more typical situation where the contract has been executed by delivery and use of the goods. The sale involved a refrigerator-freezer with a cash price of 900 dollars and added carrying charges of 246 dollars, making the total purchase price 1,145 dollars. The seller admitted that the appliance had cost him 348 dollars. The buyer defaulted on his payments, but maintained possession of the appliance. The seller then sought damages for breach of contract. The trial court held that the transaction was unconscionable and limited the seller's recovery to his wholesale price, instead of the normal retail price.⁶⁴ The decision was reversed as to the remedy with the statement that

while the evidence clearly warrants a finding that the contract was unconscionable (UCC § 2-302), we are of the opinion that plaintiff should recover its net cost for the refrigerator-freezer, plus a reasonable profit, in addition to trucking and services charges incurred and reasonable finance charges.⁶⁵

The appellate court did not specify its reasons for holding that the facts presented a clear case of unconscionability. The evidence showed, in addition to the excessive price, that the buyers were Spanish-speaking persons who could not understand English.⁶⁶ As such, they had no way of reading or understanding the sales contract which was written in English, and the seller made an effort to avoid translating or explaining the document to them.

Another case which purports to hold a contract unenforceable because the purchase price was excessive is *In re State of New York ex rel Lefkowitz v. ITM, Inc.*⁶⁷ ITM Inc. had devised an elaborate sales routine which involved alleged misrepresentations and fraudulent sales practices. The "buyers" were induced to sign the retail installment payment contracts by a plan through which the purchaser was to be paid for referring prospective customers to ITM. The trial court held that the contracts were unconscionable and therefore

⁶³ 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd as to remedy* 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Div. 1967).

⁶⁴ *Id.* at 28, 274 N.Y.S.2d at 760.

⁶⁵ 54 Misc. 2d 119, 120, 281 N.Y.S.2d 964, 965 (App. Div. 1967).

⁶⁶ 52 Misc. 2d 26, 27, 274 N.Y.S.2d 757, 758 (Dist. Ct. 1966).

⁶⁷ 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. Trial Term 1966).

unenforceable. However, the court also found that ITM, Inc. was guilty of fraudulent practices, that the scheme was an illegal lottery, and that the contracts were unenforceable because ITM, Inc. was an unlicensed foreign corporation.⁶⁸ *ITM* is another example of a court using unconscionability language in conjunction with other elements of unfairness, or alternative grounds of decision. The court held that even if the prices were not unconscionable *per se*, they were excessive in the context of the case.⁶⁹

From these cases dealing with the unconscionability doctrine as applied to excessive price, it seems fairly clear that excessive price coupled with other factors, such as a purely executory contract or a foreign-speaking purchaser who did not understand the contract, has served as a basis for finding unconscionability. Whether excessive price alone is enough has not yet been established. Of course, minor discrepancies between actual price and true value will probably never be enough to bring about a finding of unconscionability. More likely, something approaching a "shocking" discrepancy will be required. German law uses a price-value differential of one-half as a measure of unconscionability⁷⁰ and most American cases seem to require at least that much of a disparity.⁷¹

At present price-value disparity alone is probably not enough to establish unconscionability of a sales contract. The Uniform Consumer Credit Code suggests the court should consider the circumstances giving rise to the price-value disparity.⁷² While this Code has not yet been promulgated by the National Conference of Commissioners on Uniform State Laws, and probably will not be for the next year or so,* it may provide some insight as to where future legislation on this problem may be headed. Briefly, where excessive price is involved, the test for unconscionability adopted by the Uniform Consumer Credit Code looks for a "gross disparity" between the price paid and the price readily obtainable by buyers of similar credit in a credit transaction in the same area. In other words, the Uniform Consumer Credit Code does not look at the price-value disparity alone; it also looks at the buyer involved.⁷³ Apparently, it

⁶⁸ *Id.* at 62, 275 N.Y.S.2d at 329-30.

⁶⁹ *Id.* at 53, 275 N.Y.S.2d at 321.

⁷⁰ 78 HARV. L. REV. 895, 898 (1965).

⁷¹ See Skilton and Helstad, *Protection of the Installment Buyer of Goods under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1475 (1967).

⁷² UNIFORM CONSUMER CREDIT CODE § 6.111 (Tent. Draft No. 6, 1967).

⁷³ *Id.* § 6.111(3)(c).

* Prof. Shanker's remarks were made in 1967. The U3C was recently promulgated.

would recognize that the credit worthiness of some buyers is so much less than the credit worthiness of other buyers that higher prices can lawfully be charged to take care of the seller's higher risk. It is only when the higher price presents gross disparity from what a particular buyer could normally have obtained elsewhere that unconscionability might result.

The test found in the Uniform Consumer Credit Code is similar to that used recently by a Pennsylvania federal district court in *In re Elkins-Dell*.⁷⁴ Unconscionability, Judge Lord pointed out in his opinion, is not proven merely by a showing that the terms are onerous, oppressive, or one-sided. Instead, it must be shown that the terms bear no reasonable relationship to the business risks involved in the transaction. Judge Lord implied the ability of the debtor to obtain more favorable credit terms elsewhere was relevant to the issue of unconscionability.⁷⁵

The *Elkins-Dell* case arose from an involuntary bankruptcy proceeding. Prior to the initiation of the bankruptcy proceedings Fidelity American Financial Corporation executed a loan to Elkins-Dell taking an assignment of accounts receivable. When the question of enforceability was presented to the court, twenty-four thousand dollars in accounts receivable would have been included in the bankrupt's estate if the contract were held to be unconscionable. The referee so found, but the district court remanded the case for further findings of fact.⁷⁶

The ultimate question for the referee will be whether these contracts were, in the light of all the circumstances, reasonable commercial devices. Among the issues which may be explored . . . are the financial positions of the bankrupts at the time the agreements were entered into; the extent to which agreements of this kind are customary among lenders like Fidelity; the extent to which Fidelity's contracts vary with and reflect anticipated risks; the availability of other credit to the bankrupts, both at the time and after they entered into these agreements; the extent to which the various provisions were enforced by Fidelity or influenced the bankrupt's business conduct, particularly their ability to secure other funds; whether the terms of these contracts facilitated commerce by making funds available where they otherwise would not be or impeded commerce by precluding access to other sources of funds. . . .⁷⁷

⁷⁴ *In re Matter of Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966).

⁷⁵ *Id.*

⁷⁶ *Id.* at 875.

⁷⁷ *Id.* at 874.

The court also held that the referee should consider the impact of his decision or future financing in similar situations.⁷⁸

Elkins-Dell gives approval to the notion that unconscionability where price and credit are involved cannot be based on price alone but must also take into consideration the capacity of a particular buyer to get better credit elsewhere. This may be a severe limitation on the usefulness of the unconscionability doctrine to those persons who are so impoverished that they often suffer the most unfair contracts, because many of these buyers could not have gotten credit elsewhere, or at least not on any better terms.

SUMMARY

In this article the authors have tried to explore consumer protection devices found in the U.C.C. and the special problems they create. Although many of the consumer remedies discussed have not yet been clearly defined, or in some cases even recognized, by the courts, they are available to the lawyer who may represent the consumer. The discussion does not purport to be complete, but an outline of the path in which the law may develop toward greater protection of the consumer. The large number of recent cases in the area indicates that the development of the law, within the general framework created by the U.C.C., has just begun.

⁷⁸ *Id.* at 875.